UTHAYAKUMAR PONNUSAMY

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR MUSA J
[CRIMINAL APPLICATION NO: MT2 44-91-2004]
6 OCTOBER 2005

CRIMINAL PROCEDURE: *Arrest - Arrest/detention made in consequence of failure to comply with a notice under s. 111 CPC - Whether unlawful where the notice is not properly issued*

CRIMINAL PROCEDURE: *Investigation - Whether notice under s. 111 CPC may be served by a constable - Definition of "police officer" referred to in s. 111(1) and (2) of the CPC*

The applicant (plaintiff) filed this application supported by his affidavit (encl. (2)) for a number of reliefs in respect of the issuance of a number of warrant of arrests (exh. UK11 to encl. (2)) and his arrest and detention to be invalid and unlawful respectively. He also sought declaration to prevent the investigating machinery, through the police and related government agencies, to investigate into certain police reports. At the very onset of the case the parties agreed that there can be no order of injunction against the Government or its investigative machineries, and hence the applicant's prayer for an injunction was accordingly struck off.

Counsel for the applicant contended that, the Notice under s. 111 Criminal Procedure Code ("CPC") (Arahan Menghadiri Penyiasatan) (exh. "UK9", encl. (2)) was not served personally on the applicant. The applicant had come to know about it through "Tetuan M.Manoharan & Co". The reason advanced by the applicant was that there was no personal signature of his on the said notice. Exhibit UK9 was issued by one DSP Gan Tack Guan. At the bottom right of the said UK9, it was stamped as being received by M.Manoharan & Co. It required the applicant to personally be present at the police station. Counsel for the respondents contended that UK9 had been effectively served on the applicant by one L/Kpl. Zulkifli.

Held:

[1] In this application, the "police officer making (the relevant) investigation" was DSP Gan Tack Guan. As such an officer, he was empowered in law to issue "(an) order in writing" similar to exh. UK9, "requiring (the applicant to attend or be present)" before him. (p 469 f)

[2] Exhibit UK9, should have been served by DSP Gan himself and not L/Kpl. Zulkifli as reflected by intended words in the issuance of a warrant of arrest under s. 111(2) of the CPC. (p 471 d)

[3] "Police officer" referred to in s. 111(1) and (2) of the CPC is not clearly defined by s. 2 of the CPC. Section 2, only speaks of "Inspector of Police" and "Officer in charge of a Police District"; DSP Gan was neither. In such absence, rescue must be resorted to s. 2 of the Police Act 1967 ("the 1967 Act"). In the said s. 2 of the 1967 Act and in relation to DSP Gan's position in respect of this application, he was within the category of a "senior police officer" and L/Kpl. Zulkifli was a "Constable". (p 472 a-b)

[4] As such, UK11 was not properly issued and should be cancelled forthwith. Consequentially, any detention flowing from the issuance of UK11 and the likes would have been unlawful. (p 472 g)

Legislation referred to:
Criminal Procedure Code, ss. 2, 111(1), (2)
Police Act 1967, s. 2

For the applicant - M Manoharan (Chan Weng Keng, PW Moorthy, VK Sharma & Chan Tse Yean with him); M/s M Manoharan & Co
For the respondent - Mohamed Hanafiah (Suhaimi Ibrahim DPP)
Amer Hamzah watching brief for Bar Council

Reported by Amutha Suppayah

JUDGMENT

Abdul Kadir Musa J:
The applicant, Uthayakumar a/l Ponnusamy, represented by Encik M. Manoharan, Encik Chan Weng Keng, Encik P.W. Moorthy, Encik V.K. Sharma and Encik Chan Tse Yuen filed this application (encl. (3) on 30 September 2004 supported by his affidavit (encl. (2)) for a number of reliefs in respect of the issuance of a number of warrant of arrests (prayers (1)-(5) of encl. (3)) and his arrest and detention on 9 September 2004 (para (6), *ibid.*) to be invalid and unlawful respectively. He also sought declaration to prevent the

investigating machinery, through the police and related government agencies, to investigate into Pantai Police Reports 3231/04 and 003645/04 and Brickfields Police Report 4638/04 (para (10), (11) and (15), *ibid.*). The other prayers, were in my opinion, were not within the ambit of the court's consideration.

The respondents were represented by Encik Mohamed Hanafiah and Encik Suhaimi bin Ibrahim, whilst Encik Amer Hamzah was holding a watching brief for Bar Council, Malaysia.

At the very onset of the case (11 October 2004), upon one of Encik Hanafiah's preliminary objections, and my pointing out to Encik Manoharan as to his client's relief for an injunction, he agreed with the court that there can be no order of injunction against the Government or its investigative machineries, and hence such prayer as in para (10) (11) and (15) of encl. (3) should therefore be and were accordingly struck off. Having the above decided, and upon the request of both parties for more time to do the needful, I could only fix the hearing proper to be on 28 March 2005 (the first available date to court and suitable to all the parties).

On 28 March 2005, it was brought to my attention by Encik Hanafiah that there was a Federal Court case which will determine whether or not such an application as the applicant's should be filed in Criminal or Civil Registry of the High Court. As such, both parties agreed to postpone the hearing, and it was fixed on 11 April 2005. It was again postponed to 30 June 2005 upon the applicant's application.

On 30 June 2005, during the submission by Encik Manoharan, it was pointed out of the possible error in para (18) of encl. (2). As such, he requested the court to grant the applicant (and not objected by the Encik Hanafiah) a short postponement to enable him to file in corrective affidavit. I allowed his request and adjourned the continued submission to 8 August 2005.

On 8 August 2005, Encik Manoharan continued his submission by referring again to para 18 of encl. (2) and para (3) of the corrective affidavit (encl. 48) and contended that, the notice under s. 111 Criminal Procedure Code ("CPC") was not served personally to the applicant. The applicant came to know about it through "Tetuan M. Manoharan & Co". The reason advanced by the applicant was that there was no personal signature of his on the said notice dated 17 June 2004 (exh. "UK9", encl. (2)).

The said "UK9", was addressed to:

Tuan Uthayakumar a/l Ponnusamy
8-10-5 Menara Mutiara Bangsar Off
Jalan Riong, Bangsar, Kuala Lumpur.

The said UK9, was styled as:

Arahan Menghadiri Penyiasatan ...

(emphasis added).

It was issued by "DSP Gan Tack Guan, Ketua Bahagian D9A, Kuala Lumpur". At the bottom right of the said UK9, it was stamped as being received by M. Manoharan & Co, on 17 June 2004 at 11.40am. It required the applicant to personally be present "... di Pejabat Bahagian Jenayah Utama (D9), Tingkat 7, Ibu Pejabat Polis Kontingen Kuala Lumpur."

The words "Arahan Menghadiri" in the said UK9 have the effect of ordering the applicant to personally be present for the purpose(s) of investigation in respect of "Brickfields Report: 4638/2004" as intended by para (1) of the same. Such an order was certainly in line with the words "... by order in writing ..." found in s. 111 CPC.

For the purpose of this application, the relevant part of the said s. 111 CPC states as follows:

111 (i) **A police Officer making an investigation** under this chapter may **by order in writing require the attendance before** himself **of** any person ..., **and such person** shall attend as so required: ... . (emphasis added).

In this application, the "police officer making (the relevant) investigation" was DSP Gan Tack Guan. As such an officer, he was empowered in law to issue "(an) order in writing" similar to exh. UK9, "requiring (the applicant to attend or be present)" before him. Such person, that is, the applicant "... shall attend as so required ..." by and as stated in UK9. The title to UK9 was printed as:

Arahan Menghadiri Penyiasatan Di Bawah Seksyen 111 Kanun Pro[se]dur Jenayah.

In s. 111(2) of the CPC the words "such police officer" were used. "Such police officer" in the context of "A police officer making an investigation ..." contained in s. 111(1) of the CPC must therefore be the said DSP Gan. Under the said sub-section (ii) DSP Gan "may report (any) refusal (to comply with UK9) to a Magistrate" who may then, at his discretion, issued a warrant of arrest similar to UK11 to encl. (2) with or without option of bail offered. That was exactly what was done by DSP Gan. If the issuance of "Order" as per UK9 was standardised by all "such police officers" then perhaps there was nothing to comment as to its form, but it was not so as demonstrated by "NB2" to encl. (19) of Inspector Narolliza binti Bahari.

In the said NB2, the title to the "Order" was identical to UK9, in para material, and that was:

> Arahan Mengadiri Penyiasatan Di Bawah Seksyen 11, ...

However, it was obviously not in the form of a "letter" and typed as in "UK9" to encl. (2) or "GTK9" to encl. (35) of Supt. Johari bin Yahaya. NB2, used "(Polis 45 – Pin.1/84)" form. The requirement of the applicant's presence at "Balai Polis Brickfields" (for a different report) was identical in effect as UK9; that was "... menghadirkan diri anda di dalam penyiasatan polis ..." The major difference in the execution of NB2 was that, it was personally served to the applicant by the said Insp. Narolliza, which was not so in the case of executing UK9 to encl. (2). To that, it was contended by the learned senior federal counsel for the respondents that UK9 was effectively served to the applicant by L/Kpl. Zulkifli as exhibited by "GTK5" to encl. (35). Thus the question that needed to be answered was: "why the difference?", which required closer examination of legislative intention of both sub-sections (i) and (ii) of s. 111 of the CPC, and also the relevant part of the content of UK11 itself.

"A" as an adjective to "police officer" in s. 111(1) CPC and the word "such" attached to "police officer" in s. 111(2), *ibid.*, must have been intended by s. 111 CPC to be one and the same "police officer"; in the present application, was the aforesaid DSP Gan. That "police officer" must be the very officer" making an investigation" in connection with the "Brickfields Report 4638/2004". That must have been the very reason why Inspector Narolliza binti Bahari (encl. (19)) served NB2 ("order" under s. 111(1) CPC) herself as stated in para 11 of her affidavit dated 3/2/05 as follows:

> 11. Pada 22/6/2004, **saya** telah pergi **(sendiri)** ke pejabat Pemohon ... (untuk) menyerahkan ("NB2") bertarikh 22/6/2004 yang juga **memerlukan Pemohon** di Ibu Pejabat Polis Daerah Brickfield pada 24/6/2004 ... **bagi penyiasatan kes bersabit (No. Report: Pantai/0032 71/04)**. (emphasis added)

which was identically parallel in its intention as contained in s. 111(1) of the CPC; and that was "as an investigating officer". That was so because at para 4 of the same affidavit (encl. (19)), she categorically stated:

> 4. ... **saya merupakan pegawai penyiasat** dalam kes bersabit Pantai Report 3271/2004 ... (emphasis added);

The same report was referred to in para 11 quoted above.

Applying the same reasoning, the said DSP Gan must have been designated to be "Pegawai Penyiasat" within the ambit of the said s. 111(1) of the CPC. I am enhanced by that conclusion with the presence of and by way of his own admission in "UK11" to encl. (2) as follows:

> ... **DSP Gan Tack Guan** (G/9196) **(adalah) seorang pegawai penyiasat yang menyiasat kes** berdasarkan Laporan Polis **No: Brickfield Report: 4638/2004 ...** (emphasis added);

who was therefore in the same position as the said Inspector Narolliza. Both NB2 and UK9 required the applicant to appear for the purpose of "investigations" of the respective relevant police reports before Inspector Narolliza and DSP Gan respectively. As such, UK9, must therefore be served by DSP Gan himself and not L/Kpl. Zulkifli as reflected by intended words in the issuance of a warrant of arrest under s. 111(2) of the CPC as follows:

> ... dan diserahkan terhadap kamu (ie, the Application, as was done by Inspector Narolliza in the case of NB2) oleh pegawai tersebut di atas untuk tujuan siasatan.

"Pegawai yang tersebut di atas" was undisputably DSP Gan. What was "diserahkan" was "UK9" to the applicant for the purpose of "siasatan" within the context of s. 111(1) CPC. As such, it was my considered conclusion that, UK9 must be served by DSP Gan himself and not L/Kpl. Zulkifli which may have misled the learned Magistrate to issue UK11 against the applicant.

It may well be that, even though it flovoured speculation, the learned Magistrate was not highlighted of such distinction without the benefit of legal submission that may have led him to believe that DSP Gan himself served UK9 to the applicant. If that could have been his perception then, he would have been reasonably justified by the very title as to whom the warrant of arrest was addressed to; and that was to:

> Kepada Ketua Polis Negara, dan semua pegawai Polis yang lain.

In the above context, it will be necessary for me to point out that "police officer" referred to in s. 111(1) and (2) of the CPC is not clearly defined by s. 2 of the CPC. The said s. 2, only speaks of "Inspector of Police" and "Officer in charge of a Police District"; DSP Gan was neither. In such absence, rescue must be resorted to s. 2 of the Police Act 1967 ("the 1967 Act").

In the said s. 2 of the 1967, and in relation to DSP Gan's position in respect of this application, he was within the category of a "senior police officer" and L/Kpl. Zulkifli was a "Constable". A "senior police office" (for convenience) was provided by the said section as:

> ... a police officer of any rank from and including the Inspector-General down to and including and Inspector on probation.

A "Constable" is defined by s. 2, of the 1967 Act as:

> ... a police officer below the rank of Corporal and includes a Recruit;

From those two definitions above, it was and is my considered conclusion that, "a police officer (s. 111(1) CPC), "such police officer" (s. 111(2), *ibid*.), "semua pegawai polis yang lain" (in UK11) and "... oleh pegawai yang tersebut di atas untuk tujuan siasatan" (within the context of s. 111(1) of the CPC), should be, in the present application before me, DSP Gan Tack Guan, who was a "senior police officer" as defined in s. 2, of the 1967 Act. It can never and should never be a "Constable" (s. 2, 1967 Act.) as L/Kpl. Zulkifli.

For the reasons above, and since the issuance of any warrant of arrest (s. 111(2) CPC) involves liberties of individual entrenched in our Federal Institution, and if there can be two possible interpretations as to who should properly be construed as "a police officer" within the context of s. 111(1) CPC, the one that was adopted by Inspector Narolliza should be endorsed to be the correct one and not as adopted by DSP Gan. As such, and on that premise, I held that UK11 was not properly issued and be cancelled forthwith. Consequentially, any detention flowing from the issuance of UK11 and the likes would have been unlawful.